(3)

Supreme Court, U.S.
FILED
JUN 18 1993
OFFICE OF THE CLERK

No. 92-1807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GLOBAL DIVERS & CONTRACTORS, INC.,

Plaintiff-Petitioner,

vs.

LEEVAC CORPORATION, LEEVAC SHIPYARDS, INC., BOSTON OLD COLONY INSURANCE COMPANY and LLOYDS OF LONDON AND INSTITUTE COMPANIES,

Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RUSSELL E. BROOKS
Counsel of Record
Attorney for Petitioner
Global Divers & Contractors, Inc.
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-5000

Of Counsel:
MILBANK, TWEED, HADLEY & MCCLOY

BEST AVAILABLE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1992

No. 92-1807

GLOBAL DIVERS & CONTRACTORS, INC.,

Plaintiff-Petitioner

-against-

LEEVAC CORPORATION, LEEVAC SHIPYARDS, INC., BOSTON OLD COLONY INSURANCE COMPANY AND LLOYDS OF LONDON AND INSTITUTE COMPANIES,

Defendants-Respondents

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents' brief in opposition asserts that the petition presents no reason for review sanctioned by Supreme Court Rule 10. Respondents cite a number of recognized reasons for review which do not apply but ignore the reason set forth in the petition. The decision below has failed to follow the principles articulated by this Court and other courts of appeal for interpreting and applying Rule 56 of the Federal Rules of Civil Procedure. This Court and all

the courts of appeal require that all permissible inferences be accorded to the party opposing a motion for summary judgment. That principle was not followed below. Moreover, this case presents for the first time an opportunity for this Court to address whether the parol evidence rule can be used on a motion for summary judgment to exclude an oral admission by the party seeking summary judgment which, if admitted, would defeat summary judgment. See Kutner Buick, Inc. v. American Motors Corp., 1986 W.L. 11067 (E.D. Pa. Oct. 2, 1986), cited and discussed in the petition at 14-15.

The facts permit permissible inferences in Global's favor that the word "property" in the Master Service Agreement does not include the "vessel" itself; that the contracting parties would not have provided an indemnity for Leevac and also agreed that Global pay for Leevac to insure the risk idemnified; and that if the parties intended "property" to include "vessel", they would have used the term "vessel" as they did in many other provisions of the contract documents. Moreover, the decision below conflicts with the commonly accepted principle of law in all courts that parol evidence is admissible to construe an ambiguous term in a contract and, even where the contract is unambiguous, parol evidence is admissible where both parties agree that the written contract does not reflect their true intent.

Supreme Court Rule 10.1(a) specifies review to be often appropriate where a Court of Appeals has rendered a decision which so far departs from the accepted and usual course of judicial proceedings and has sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. This is such a case.

Respondents contend that it is attorney Burke's parol evidence which should be admitted if any parol

evidence is admitted to help construe the word "property" in the indemnity provision, because for over thirty years Leevac has relied on the legal and negotiation skills of Burke. While it is understandable that any litigant would prefer its attorney to represent it as its witness at deposition, Leevac appointed Burrell and not Burke as its representative under Rule 30(b)(6) of the Federal Rules of Civil Procedure to testify on the issue of the contract for conversion of the vessel. Leevac could have appointed Burke if Burrell did not have knowledge and Burke did. Rule 30(b)(6) provides that the corporation may appoint "other persons who consent to testify on its behalf." Global is entitled to rely upon the admission of the appointed witness Burrell, who did not hesitate when looked straight in the eye and was asked whether "property" included the vessel. Burrell said "No." Leevac is bound by "No."

Respondents argue (Br.* 5) that Global prepared the language of Section 9(b) of the Master Service Agreement indemnifying Leevac. However, respondents also state (Br. 2) that Burke requested the provision indemnifying Leevac "because Global contemplated using its own personnel and equipment at Leevac Shipyard during the conversion of the vessel." Obviously, if Burke requested inclusion of Section 9(b) in the Master Service Agreement, its wording must have been reviewed by and approved by Burke, an attorney for Leevac with thirty years experience in such matters.

Respondents advised the Court (Br. 3) that Global independently carried hull insurance on the vessel. This was disclosed in the petition. Respondents neglected to advise the Court that although Global made claim on the one

---

* "Br." refers to the designated pages of respondents' brief in opposition.

policy it had on the vessel, its claim was rejected because coverage was held not to apply to damage caused by ship repairer's negligence (see pet. at 8).

Respondents contend that there is no ambiguity in construing the word "property" to include "vessel", because "property" is defined to mean "all property." However, the only way to avoid a permissible inference in Global's favor that "property" does not include "vessel" was to have used the word "vessel" in the indemnity. This specificity is especially necessary where "vessel" is used in other provisions of the contract documents; the owner of the vessel is bringing its own property upon the vessel to do work at the same time that the shipyard is working on the vessel; and the shipowner is paying the premiums for the shipyard's insurance which would cover damage to the vessel while under repair.

CONCLUSION

The petition presents issues which merit "exercise of this Court's power of supervision" and should be granted.

June 17, 1993

Respectfully submitted,

RUSSELL E. BROOKS
Attorney for petitioner
Global Divers & Contractors, Inc.
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-5000

Of Counsel

Milbank, Tweed, Hadley & McCloy